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IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINETEEN HUNDRED AND EIGHTY-TWO

CASE NUMBER

ERNEST WADERE SHAHID, JR.,
PETITIONER.

versus

STATE OF FLORIDA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

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COUNSEL FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINETEEN HUNDRED AND EIGHTY-TWO

CASE NUMBER

ERNEST WADERE SHAHID, JR.,

versus

STATE OF FLORIDA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, ERNEST WADERE SHAHID, JR., by and through his undersigned counsel, respectfully prays that a Writ Of Certiorari issue to review the judgement and decision of the District Court of Appeal of Florida, First District, entered in these proceedings on the 27th day of May, 1982.

OPINION BELOW

The opinion of the District Court of Appeal of Florida, First District, is not reported at the present

time, but is included in the Appendix hereto. The decision of the Circuit Court in and for the First Judicial Circuit of Florida is unreported, but included in the Appendix hereto.

JURISDICTION

The judgment and decision of the District Court of Appeal of Florida, First District, was entered on May 27, 1982. This petition for writ of certiorari is timely filed within sixty (60) days of the judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). See Williams v. Florida, 399 U.S. 78 (1970); Nash v. Florida Industrial Commission, 389 U.S. 235 (1967); Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE FIRST DISTRICT COURT OF APPEALS' DECISION IN SHAHID V. STATE IS IN EXPRESS CONFLICT WITH THIS COURT'S DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257 ?

II

WHETHER FLA.R.CRIM.P. 3.172(i), WHICH REQUIRES A DEFENDANT TO SHOW THAT HE WAS PREJUDICED BY THE VIOLATION OF A PLEA BARGAIN, CIRCUMVENTS THE CONSTITUTIONAL SAFEGUARDS ERECTED BY THIS COURT IN ITS DECISIONS IN SANTOBELLO V.

NEW YORK, 404 U.S. 257 ?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time establish ...

SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, and the laws of the United States ...

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, ... nor be deprived of life, liberty, or property, without due process of law; ...

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the

assistance of counsel for his defense.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA RULES OF CRIMINAL PROCEDURE

RULE 3.171

PLEA DISCUSSIONS AND AGREEMENTS

(a) In General. Ultimate responsibility for sentence determination rests with the trial judge. However, the prosecuting attorney, the defense attorney, or the defendant, when representing himself, are encouraged to discuss and to agree on pleas which may be entered by a defendant. Such discussion and agreement must be conducted with the defendant's counsel . . . . .

(b) Responsibilities of the Prosecuting Attorney.

(1) A prosecuting attorney may:

(B) Make a recommendation, or agree not to oppose the defendant's request for a particular sentence, with the understanding that such recommendation or request shall not be binding

upon the trial judge; or . . . . .

(d) Responsiblities of the Trial Judge. After an agreement on a plea has been reached, the trial judge may have made known to him the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, he shall advise the parties of whether other factors (unknown at the time) may make his concurrence impossible.

FLORIDA RULES OF CRIMINAL PROCEDURE
RULE 3.172 ACCEPTANCE OF GUILTY
OR NOLO CONTENDERE

(a) Before accepting a plea of guilty or nolo contendere the trial judge shall satisfy himself that the plea is voluntarily entered . . .

(c) Except where a defendant is not present for a plea, pursuant to the provisions of Rule 3.180(c), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he understands the following:

(vii) The complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result.

(i) Failure to follow any of the procedures in this Rule shall not render a plea void absent a showing of prejudice.

STATEMENT OF FACT

The Petitioner was charged, by direct criminal information with, "Trafficking In Cocaine" in violation of Sec. 893.135 (1)(b) Fla.Stat. (1981) and "Possession Of

Hashish" in violation of Sec. 893.13(1)(e) Fla.Stat. (1981) in the First Judicial Circuit Court of the State of Florida in and for Okaloosa County on March 6, 1981 (A. 1-2).

The Petitioner appeared before the Honorable G. Robert Barron, Circuit Judge in the Okaloosa County Courthouse on March 16, 1981, for arraignment on the foregoing charges (A. 3). Pursuant to plea negotiations between the Petitioner's attorney, J. LaDon Dewrell, and the Assistant State's Attorney, Keith Brace, the Petitioner tendered a plea of nolo contendere to the aforesaid charges (A. 4). In return for his plea, the State agreed to stand mute regarding sentence (A. 7, 24), and to nolle prosequi all lesser offenses arising out of the charged transaction (A. 4-6). After the Petitioner entered his plea, the prosecutor violated his plea agreement to stand mute regarding sentence, when the following colloquy occurred:

> JUDGE: And there is no agreement between the defense and the State as to the sentence which could be imposed upon this defendant, the sentence being solely in the discretion of the Court? Is that correct?
>
> MR. DEWRELL: That's correct your Honor.
>
> MR. BRACE: It is understood by the State that is within the discretion of the Court. It is further understood by the State that the defendant is going to receive the maximum sentence permissible under law, that being 30 years on the trafficking and five years on the possession.
>
> JUDGE: Mr. Shahid, do you understand the

terms and conditions of the plea so far announced by your counsel?

MR. DEWRELL: No sir, he does not because Mr. Brace has just perhaps unintentionally, as my client pointed to me violated one of the tenants of our agreement; specifically, that the State would stand mute as to sentencing in this cause and that would be a matter solely within the discretion of the Court. If I am wrong, correct me, Keith.

MR. BRACE: That may well be, because negotiations have been going on for a week and the terms of the negotiation have changed daily. However, I don't think it's unusual for all parties before the Court to discuss what the sentence is going to be. I don't think that comes as a surprise to anyone. It certainly doesn't come as a surprise to me.

MR. DEWRELL: It's my understanding --

JUDGE: Gentlemen, I might clear this matter up. In order for the State to agree to any sentence or the defense either one to be imposed by the Court, the Court would necessarily have to be part of that agreement. This Court has not agreed to impose any particular sentence. Upon being notified that the defendant was going to plead, it was my understanding that the State was going to secure the guilty or a nolle contendere plea on those two charges. The Court had indicated that unless there were circumstances to alter my position penalty under these charges, but unless I am mistaken in my interpretation of the conference of counsel the Court has not agreed to any particular sentence.

Is that your understanding, Mr. Brace?

MR. BRACE: Not exactly. I am not at all reluctant to take on Mr. Dewrell. I am not quite as anxious to encounter the wrath of the Court. We have had some fairly candid discussions about this case and that is certainly the impression that I have. It's my impression that he is going to get 35 years. I realize that it is not the prerogative of the State Attorney's office to impose sentence. It is certainly within the discretion of the Court and it is not binding on the Court, but that is the impression myself was left with. One further factor that is a condition of this is that the defendant is to remain in custody without bond upon the acceptance of the plea by the Court pending any sentence.

JUDGE: Mr. Dewrell?

MR. DEWRELL: The bail provision as mentioned by Mr. Brace was included and is a part of the negotiated plea in this case, Your Honor. It is my understanding that the Court is to order presentence investigation that the Court will permit, at the defendant's expense, the defendant to be examined by certain physicians for the purpose of reporting to this Court and giving this Court the benefit of their expert opinion within the area of their expertise on any matters that might have bearing upon what would be a proper sentence in this case. That is, particularly when I have objected to Mr. Brace's representation that there's an agreement for Mr. Shahid to receive 35 years. There is an agreement that that is the maximum he could receive, that matter being in the discretion of the Court and not being totally unfamiliar with this Court's disposition as to sentence. It is our desire to have a presentence investigation and the have Mr. Shahid examined by some physicians in the local community and for them to submit in writing their findings to this Court for the Court's consideration in determining an appropriate sentence.

Id., Appendix, pages 7-9.

Despite the prosecutor's admitted violation of the plea bargain, the Court did not, affirmatively, offer the Petitioner an opportunity to withdraw his plea nor did the Court inform the Petitioner that the prosecutor's violation of the plea bargain make it impossible to conform to the terms of that plea bargain.

The prosecutor admitted his promise to stand mute at sentencing in his statement contained in the Petitioner's presentence investigation report (A. 24). Mr. Brace continued to violate his agreement to stand mute at sentencing when he had the recommendation of Sam Brewer of the Okaloosa County Sheriff's Department included in the presentence investigation report that was to be used by the Court in passing sentence. Mr. Brewer's statement recommended the same maximum sentence recommended by Mr. Brace to the Court (A. 24). The Court went on to sentence the Petitioner to 30 years for "Trafficking In Cocaine" with a 5 year consecutive sentence for "Possession Of Hashish"; the maximum sentence on each charge recommended by the prosecutor (A. 44).

The Petitioner filed Notice Of Appeal to Florida's First District Court of Appeals and the State responded with a Motion To Dismiss the Appeal (A. 53-54) on the grounds that the Petitioner had not given the Trial Court an opportunity to withdraw the judgment and sentence. The First District Court of Appeals ordered the Petitioner to show cause why his Appeal should not be dismissed (A. 55) and the Petitioner replied with a Request To Voluntarily Dismiss The Appeal pending a resolution of the violated plea bargain by the Trial Court (A. 58-60). The First District Court of Appeals entered the order requested by the Petitioner dismissing the Appeal without prejudice (A. 61).

Following the Court order, the Petitioner filed his Motion To Vacate Sentence And To Withdraw Plea with the Trial Court (A. 62-63). On October 26, 1981, Judge Barron issued his order denying the Motion To Vacate Sentence And To Withdraw Plea (A. 64). In his

order, Judge Barron made the specific finding in fact that the State did not violate any plea agreement between the State and the Defense (A. 62).

After the Trial Court denied the Petitioner's Motion To Vacate Sentence And To Withdraw Plea, the Petitioner returned to the First District Court of Appeals where his case was docketed under Case No. AI-205. The Petitioner filed his Brief Of Appellant raising the following issue:

> WHETHER THE ASSISTANT STATE ATTORNEY'S VIOLATION OF THE PLEA AGREEMENT TO REMAIN MUTE AS TO APPELLANT'S SENTENCING RENDERS APPELLANT'S NO CONTEST PLEA INVOLUNTARY.

Id., Appendix, pages 65-73.

The State failed to file a Reply Brief and the case was decided by the Court on the merits of the Petitioner's Brief and the Record On Appeal. On April 20, 1982, the First District Court of Appeals of Florida, Per Curiam Affirmed, the judgment and sentence of the Trial Court (A. 74), and the Petitioner timely filed a Motion For Rehearing (A. 75-78). On May 27. 1982, the Petitioner's Motion For Rehearing was denied by Florida's First District Court of Appeals without opinion (A. 79).

The First District Court of Appeal's citation, Per Curiam Affirmed, bars the Petitioner from review by the Florida Supreme Court pursuant to the 1980 Florida Constitutional Amendment. See, Jenkins v. State,385 So.2d 1356, 1359 (Fla. 1980).

REASONS FOR GRANTING THE WRIT

I

THE FIRST DISTRICT COURT OF APPEALS' DECISION IN SHAHID V. STATE, IS IN EXPRESS CONFLICT WITH THIS COURT'S DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257.

The State of Florida in the person of Mr. Keith Brace, coerced the Petitioner into entering a nolo contendere plea in the above styled cause. The coercion offer was, that the State of Florida would stand mute as to the sentence imposed and would nolle prosequi all lesser offenses arising out of the charged transaction. The transactional immunity offered prevented the Petitioner from receiving any concurrent sentences for offenses arising out of the charged transaction. It did not limit or reduce the length of the sentences received, and offered no real advantage other than to reduce the Petitioner's legal expenses. See, Florida's Single Transaction Rule contained in Brown v. State, 206 So. 2d 377 (Fla. 1968). On the other hand, the prosecutor's promise to "stand mute" in regards to the sentence imposed, offered the Petitioner the very real advantage of receiving less than the maximum sentence. The prosecutor violated his promise to stand mute at the Petitioner's plea hearing and admitted this violation when challenged by the Petitioner's legal counsel. The prosecutor continued to violate his plea

agreement when he included the arresting officer's recommendation of maximum sentence in the Petitioner's presentence investigation report used by the Judge in passing sentence. Despite this dual violation of the plea agreement, the Judge failed to affirmatively offer the the Petitioner an opportunity to withdraw his plea, instead the Judge stated that he was uninfluenced by the prosecutor's recommendation and sentenced the Petitioner to the maximum sentences recommended by the prosecutor.

The facts of the case sub judice and the facts presented in Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971) are all but identical. In both, Santobello and Shahid the prosecutors agreed to "stand mute" in regards to sentence as part of plea agreement. In both Santobello and Shahid the prosecutors agreed to nolle prosequi additional charges as part of the plea agreement. In Santobello the prosecutor nolle prosequi the major charges, leaving Santobello with a misdemeanor charge. In Shahid the prosecutor nolle prosequi the lesser offenses leaving Shahid with the highest offenses charged. In both, Santobello and Shahid the prosecutors violated the plea agreement to "stand mute" as to the sentence imposed. In Santobello this violation of the plea agreement was occasioned by a change in the prosecutors handling the case. In Shahid the prosecution had no such excuse. In both Santobello and Shahid, the Trial Judges disavowed any reliance on the prosecutors violation of the plea agreement in passing sentence. In both, Santobello and Shahid, the Trial Court failed to affirmatively offer the defendants an opportunity to withdraw their pleas. In both, Santobello and Shahid, the Appellate Courts upheld the Trial Court's disavowals.

The facts of the Petitioner's case are so close to the facts presented in Santobello, that there can be no doubt that the First District Court of Appeals, with its, Per Curiam Affirmed, opinion, placed itself in conflict with this Court. Article III, Sec. 1. of the United States Constitution vests the judicial authority of the United States in this Court. Article III, Sec. 2 of the United States Constitution extends this Court's judicial power to all cases in law and equity arising under this Constitution. Williams v. State of Georgia, 75 S.Ct. 814, 349 U.S. 375, 99 L.Ed. 1161 (1955). Florida's First District Court of Appeals has placed itself in express conflict with this Court on a point of law determined by this Court in Santobello v. New York, supra. Egan v. City of Aurora, 81 S.Ct. 684, 365 U.S. 514, 5 L.Ed.2d 741 (1961). The conflict must be resolved in the favor of this Court; this warrants the grant of certiorari. Wilkinson v. United States, 365 U.S. 399 (1961), reh. den., 365 U.S. 890; United Gas Pipeline Company v. Memphis Light, Gas, & Water Division, 358 U.S. 103 (1958).

The facts of the case sub judice also parallel the Third Circuit Court of Appeals' decision in Patrick v. Camden County Prosecutor, 630 F.2d 206 (3rd Cir. 1980), in which the Third Circuit Court of Appeals echoed this Court's decision in Santobello v. New York, supra, holding:

> Although it is not made clear in Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), that the violation of a plea bargain by the state involves a defendant's due process right, we are satisfied that such a right is implicated.

The Petitioner agrees with the above statement by the Third Circuit Court of Appeals. The Petitioner's right to "due process" and "equal protection" of law guaranteed him by the Fifth and Fourteenth Amendment to the Constitution of the United States has been abridged by the actions of the Florida Courts.

II

FLA.R.CRIM.P. 3.172(i), WHICH REQUIRES A DEFENDANT TO SHOW THAT HE WAS PREJUDICED BY THE VIOLATION OF A PLEA BARGAIN, CIRCUMVENTS THE CONSTITUTIONAL SAFEGUARDS ERECTED BY THIS COURT IN ITS DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257.

Rule 3.171 of the Florida Rules of Criminal Procedure, titled: plea Discussions And Agreements, must be read in pari materia with Rule 3.172 of the Florida Rules of Criminal Procedure, titled: Acceptance of Guilty or Nolo Contendere Pleas. Since revision of the Florida Rules of Criminal Procedure removed the penalty section of Rule 3.171(d), titled: Responsibilities of the Trial Judge and placed it under Rule 3.172(i), which reads:

> Failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice.

Under this Rule and Florida case law, a defendant

who suffers a violated plea bargain, must make an affirmative showing of prejudice in order to withdraw his plea. The Petitioner contends that this requirement of Florida law circumvents the safeguards erected by this Court in its decision in Santobello v. New York, supra.

In Shahid v. State, the Trial Judge made the specific statement that he was not relying upon the recommendations of the prosecutor that the maximum sentence be imposed. Since the Trial Judge disavowed reliance upon the prosecutor's recommendation, Shahid could not make the required showing of affirmative prejudice and was not entitled to relief under Florida law.

In Machibroda v. United States, 82 S.Ct. 510, 368 U.S. 487 (1962), this Court held that a guilty plea induced by unkept promises vitiated the voluntariness of the plea and rendered it subject to collateral attack. Since the Florida Rules of Criminal Procedure encourage a defendant to plea bargain, there can be no doubt that the State is involved in coercing a defendant to waive his basic rights. In Santobello v. New York, supra, Mr. Justice Douglas elaborated on the rights surrendered by a defendant when he enters a plea bargain:

> However important plea bargaining may be in the administration of criminal justice, our opinions have established that a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of fundamental rights to a jury trial, Duncan v. Louisianna, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, to confront one's accusers, Pointer v. Texas, 380 U.S.

400, 85 S.Ct. 1065, 13 L.Ed.2d 1019, to remain silent, Malloy v. Hogan, 378 U.S. 1, 84 S.ct. 1489, 12, L.Ed.2d 653, and to be convicted by proof beyond all reasonable doubt, In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368. Since Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009, this Court has recognized that "unfairly obtained" guilty pleas in the federal courts ought to be vacated. In the course of holding that withdrawn guilty pleas were not admissible in subsequent federal prosecutions, the Court opined:...

Because of the importance of the plea bargaining system to the orderly administratioin of the criminal justice system, and because of the fundamental nature of the rights waived, this Court erected certain safeguards to insure the voluntariness of the waiver. One of those safeguards is that when a plea rests in any significant degree on a promise or agreement of a prosecutor, that promise or agreement must be fulfilled. Any breech of a promise or agreement that forms a basis of a plea bargain must result in the defendant being given an affirmative opportuntiy to withdraw his plea and go to trial on the merits. Failure to allow this opportunity to a defendant is to deny him fundamental fairness. Florida Rules of Criminal Procedure 3.172(l) deny a defendant fundamental fairness. This Rule requires the defendant to make two (2) showings: first, that the plea bargain has been violated, and, second, that he has been prejudiced thereby. The second showing is almost impossible to make.

Florida Rules of Criminal Procedure 3.172(l) is Unconstitutional and repugnant. It expressly conflicts with

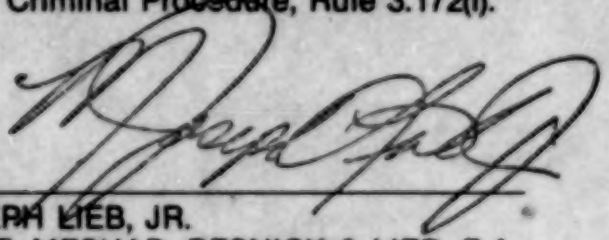
this Court's decision in Santobello v. New York, supra, and denies the Petitioner due process of law guaranteed him by the Fifth and Fourteenth Amendments to the Constitution of the United States. It has abridged his right to a fair trial guaranteed him by the Sixth Amendment to the Constitution of the United States and it has denied him equal protection of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

This Court has traditionally been concerned with constitutional questions relating to the validity of State criminal procedures. See, Jackson v. Denno, 378 U.S 368 (1964). Important Constitutional questions which relate to the effective administration of the criminal justice system have long been held sufficient to invoke the certiorari jurisdiction of this Court; in particular questions involving plea bargaining provide a sound basis for the issuance of the writ. See, Santobello v. New York, supra.

This case presents an important issue of Constitutional dimensions concerning the effective administaration of the criminal justice system. The improper manner in which the State of Florida has applied the dictates of Santobello v. New York, supra, and the lack of uniformity with which this decision has been applied warrants the issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Petitioner requests that this Court issue a Writ Of Certiorari to review the decision of Florida's First District Court of Appeals in Shahid v. State, and the Constitutionality of Florida Rules of Criminal Procedure, Rule 3.172(i).



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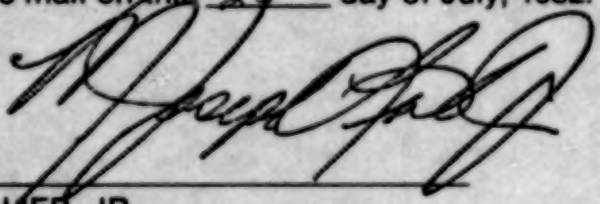
CERTIFICATE OF SERVICE

I hereby certify that I have served true and correct copies of the foregoing Petition For Writ Of Certiorari upon the Honorable Jim Smith, Attorney General, Florida Department of Legal Affairs, State Capitol, Tallahassee, Florida 32304, by placing same in a sealed postage prepaid envelope and depositing it in the United States mail on this 23rd day of July, 1982.



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Counsel For Petitioner

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ERNEST W. SHAHID, JR.,	)	NOT FINAL UNTIL TIME EXPIRES TO FILE
Appellant,	)	REHEARING PETITION AND DISPOSITION
vs.	)	THEREOF IF FILED.
STATE OF FLORIDA,	)	CASE NO. AI-205
Appellee.	)	

Opinion filed April 20, 1982.

An Appeal from the Circuit Court for Okaloosa County.

Larry Byrd, Sarasota, and M. Joseph Lieb, Jr., Sarasota, for Appellant.

No Response for Appellee.

PER CURIAM.

AFFIRMED.

ERVIN, SHIVERS, and WENTWORTH, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32301
Telephone No. (904) 488-6152

Date: May 27, 1982
CASE NO. AI-205

ERNEST W. SHAHID, JR. VS. STATE OF FLORIDA

Appellant/Petitioner Appellee/Respondent

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

The following action was taken in the above-styled case on the above date:

Request for oral argument DENIED.
Motion for rehearing DENIED.

By Order of the Court
RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Larry Byrd, Esquire, Sarasota, Florida
M. Joseph Lieb, Jr., Esquire, Sarasota, Florida
Jim Smith, Attorney General, Tallahassee, Florida

Deputy Clerk